Before the
Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Review of Regulatory Requirements for	)	CC Docket No. 01-337
Incumbent LEC Broadband	)	
Telecommunications Services	)	

Comments of the
Public Service Commission of Wisconsin

Introduction and Summary

The Public Service Commission of Wisconsin ("Commission") supports adoption of federal policies that promote the deployment of broadband facilities and services, especially to areas that the market may overlook,[1] while also promoting competition and protecting the service quality of plain old telephone service ("POTS"). Policymaking as to the provision of broadband services is currently a fluid and dynamic environment; the broadband technology or platform that may foster the "killer app" is unknown even to the industries best positioned to deliver it, much less to the policymakers. Deployment of current next generation technology capable of delivering high-quality video has stalled in the face of regulatory uncertainty. As broadband Internet access continues to evolve in steady yet unpredictable ways, one certain factor is the role of incumbent local exchange carriers ("ILECs") as the gatekeepers of the bottleneck facilities that lead to that last mile to the consumer. Policymakers must keep the keys for these gates.

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[1] The FCC acknowledged this "digital divide" in its second annual report to Congress naming five groups as vulnerable to being bypassed: rural, inner-city, low-income, minority, and tribal.

The ILECs consistently claim that eliminating the disparity between regulation of their broadband provisioning and so-called lack of regulation of cable broadband providers would enhance deployment of advanced services.[2] This regulatory disparity between cable and wireline may contribute to the slower pace of Digital Subscriber Line ("DSL") service. However, it is just as likely that slower growth in demand and the higher price of broadband contribute equally to the slower pace for DSL.[3] More important, ILECs' continued reluctance to make their networks available to competitors has also slowed the ILECs' DSL rollout.[4]

Empirical evidence that regulation is slowing, even impeding delivery of broadband over the traditional wireline of the incumbent local exchange carriers cannot be ignored: of the 5.9 million subscribers to advanced services, 3.3 million subscribed to cable-based services while one million subscribed to asymmetric DSL service.[5] Yet, in the General Accounting Office's ("GAO") February 2001 report on its survey of Internet users, only some 12 percent of the survey respondents subscribed to broadband; while 52 percent of respondents had access to broadband.[6] "Broadband is obviously not as important for the average American as the telephone, in terms of connectivity to the rest of civilization. But with the explosion of

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[2] Reply Comments of SBC Communications Inc., at p. 5, *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to all Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146 (filed April 4, 2000).

[3] The Computer Systems Policy Project ("CSPP") cites to an Information Technology Association of America report that found that 32 percent of respondents with dial-up Internet connections felt that upgrading to a faster service would be too expensive. CSPP Report, BUILDING THE NETWORKED WORLD, at p. 19, available at www.cspp.org.

[4] DSL ENTERTAINMENT, Executive Summary (Simon Murray, ed.)(March 2001), available at http://bookshop.informamedia.com/dslent/?source=imfldsl.

[5] See FCC Releases Report on the Availability of High-Speed and Advanced Telecommunications Capability, available at http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2002/nrcc0201.html.

[6] CHARACTERISTICS AND CHOICES OF INTERNET USERS, United States General Accounting Office, February 2001, at pp. 6-7.

e-commerce, broadband will play an increasingly critical role in the position of the United States in the global economy."[7]

Broadband will lead to increased convergence of different services (voice, data, video) requiring that policymakers adopt a balanced approach mechanism. Such a balanced approach must contain market opening and competition enhancing policies that loosen the bottleneck but also foster innovation and investment. Only then can the Federal Communications Commission ("FCC") guard against monopolization of broadband.

The Comments that follow are those of Commissioners Joseph P. Mettner and Robert M. Garvin. Chairperson Ave M. Bie respectfully dissents from these comments.

I. Identification Of Incumbent LEC-Provided Broadband Services Markets

A. Relevant Product Market

In its analysis of the competitive effects of the proposed WorldCom, Inc. and MCI Communications Corp. merger on domestic, interstate, interexchange services, the FCC identified two broad categories of markets for telecommunications services: residential customers and small business (mass market); and medium-sized and large business customers (larger business market).[8] The FCC distinguished mass market consumers from larger business consumers by the larger business users' demand of advanced long distance features such as frame relay, virtual private networks ("VPN"), and enhanced 800 services (E800 services).[9] The FCC also found that larger business customers generally demanded greater volumes of minutes

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[7] Tim McDonald, *Time for Broadband Regulation*?, E-COMMERCE TIMES, August 10, 2000; available at http://www.ecommercetimes.com/perl/story/3999.html.

[8] *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025, 18040, par. 24 (1998).

[9] *Id*. at par. 26.

than mass market customers, and thus qualified for volume discounts that were unavailable, as a practical matter, to mass market customers.[10]

The Commission believes that it is still reasonable to broadly categorize markets for broadband into mass and larger business markets constrained only by price and demand for bandwidth. Segmenting the relevant product markets is critical in helping the FCC examine in the future the extent of competition in the broadband arena. Too narrow a market may mislead policymakers into thinking that there is greater competition than actually exists; while too broad a market would tend to show that there is less competition. However, because the residential portion of the mass market is dominated by cable while DSL dominates the small business portion of the mass market, it may also be reasonable to further segment markets by carving out the residential market as a stand alone market.

B. Relevant Geographic Market

Having previously identified the geographic scope of the relevant market for broadband as local, the FCC seeks comment on the appropriate geographic market for each of the relevant product markets for broadband services. From a consumer's perspective, the relevant geographic market is local because broadband DSL or cable access can usually only be purchased locally. Thus, the Commission believes that it is appropriate to use the customer aggregation market definition the FCC proposed in the *WorldCom/MCI Merger Order*. That is, to include as local all customers facing similar competitive choices.

[10] *Id*.

C. Market Power Analysis

This Commission agrees with the FCC that ILECs exercise market power by virtue of their control over bottleneck facilities and may also exercise market power through cross-subsidization and improper discrimination.[11] The ILECs' control of bottleneck facilities is an issue that the FCC, the states and the courts have wrestled with since enactment of the Telecommunication s Act of 1996. Understandably, ILECs are reluctant to roll out new technology that if accepted, competitors may receive at forward-looking-costs; while if not accepted, the ILECs alone would incur the loss.[12] This alone reduces ILEC innovation and any incentive to compete.

SBC is currently deploying Project Pronto, a costly venture to provide DSL to 80 percent of its customers that has the potential to be a money-losing proposition if DSL does not gain consumer-wide acceptance. If SBC's venture looses money, SBC's shareholders will bear the brunt of the financial loss. On the other hand, if Project Pronto is a hit, and if SBC is required to unbundle Project Pronto at cost-based prices, SBC would have little, if any, incentive to continue its rollout, and has in fact taken steps to slow down such rollout.[13]

As an example, in Wisconsin, SBC/Ameritech states that competitors do not need access to Project Pronto as an unbundled network element ("UNE") because as Project Pronto is an

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[11] For example, the Commission's record in AADS' certification docket supported the conclusion that tariff pricing is reasonable and necessary to prevent injury to competition by the potential discrimination inherent in pre-ordering and ordering OSS that are excessively reliant upon subjective, human intervention and that lack strong controls. *Petition of Ameritech Advanced Data Services of Wisconsin, Inc. for Authorization to Resell Frame Relay Switched Multimegabit Data, and Asynchronous Transfer Mode Services on an Intrastate Basis and to Operate as an Alternative Telecommunications Utility in Wisconsin*, 7825-TI-100; *Investigation into the Digital Services and Facilities of Wisconsin Bell, Inc*. (d/b/a Ameritech Wisconsin), 6720-TI-154. (rel. January 13, 2000).

[12] George Bittlingmayer and Thomas W. Hazlett, *The Financial Effects of Broadband Regulation*, (October 25, 2001, available at www.citi.columbia.edu/broadband_presentations/brittlingmayer_paper.pdf.

overlay network, CLECs are free to use the existing copper loop plant to provide xDSL services.[14] Competitors argue that this ignores the fact that the existing copper loop plant is being replaced by both copper and fiber, materially diminishing a competitor's ability to serve its market if the competitor is denied access to the facilities.[15]

SBC/Ameritech admits that one of the reasons why it is building Project Pronto is to make advanced services available to over 20 million customers in its 13 state region that cannot receive DSL service today because of technical and operational issues.[16] The logical corollary to this is that CLECs cannot use the existing copper loop plant to serve 20 million customers in the 13 state region.

The FCC has stated that: "It is reasonable to expect that, in many cases, competitors would want to provide ubiquitous service in order to achieve similar economies of scale that will allow them to spread the costs of construction, equipment, and marketing across as many customers as possible. … Denying access to the incumbent's unbundled network elements, when use of alternative sources would materially diminish the competitor's ability to serve their intended geographic area, would be inconsistent with the goal of the 1996 Act to bring competition to the greatest number of customers."[17] Without unbundled access to Project

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[13] Karen Brown, *SBC Takes Pronto Out Of DSL Buildout Pace,* BROADBAND WEEK (October 29, 2001), available at www.broadbandweek.com.

[14] Ameritech's Initial Brief, *Investigation into Ameritech Wisconsin's Unbundled Network Elements*, Docket No. 6720-TI-161, filed June 1, 2001, at p. 182.

[15] CLECs' Initial Brief, Docket 6720-TI-161, at p. I.C.-98.

[16] Second Memorandum and Order, *In the Matter of Ameritech Corp. and SBC Communications, Inc. for Consent and Transfer Control of Licenses,* CC Docket No. 98-141, FCC 00-336 (rel. September 8, 2000) (Project Pronto Waiver Order), at par. 4.

[17] *Third Report and Order, In the Matter of the Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, FC 99-238 (rel. November 5, 1999) (UNE Remand Order), at par. 98.

Pronto, CLECs will not be able to offer DSL services to the same ubiquitous market that Ameritech can.

CLECs are also likely to be competitively disadvantaged from cost and quality perspectives if they use copper to line share while the Ameritech affiliate, Ameritech Advanced Data Services ("AADS"), is using Project Pronto. Project Pronto loops are engineered to be 12,000 feet or less. This gives Ameritech or its affiliate AADS two advantages. First, it will not have to pay Ameritech for conditioning charges to remove interferers like load coils because loops under 12,000 feet are not subject to conditioning charges. Conversely, CLECs that obtain loops at lengths greater than 12,000 feet must pay Ameritech high charges for the removal of load coils, bridged taps, and the like. Even if proposed conditioning charges are reduced as suggested by the CLECs, Ameritech or its affiliate will have no charge for conditioning because their loops will be less than 12,000 feet. This Commission has taken action to alleviate this disparity, but such a disparity does exist in other states. In its oral deliberations on December 19, 2001, this Commission determined that conditioning charges should be recovered as a monthly recurring charge applicable to all DSL capable loops.[18]

Second, loops less than 12,000 feet like the copper portion of the Project Pronto loops are capable of transmitting data much faster than legacy copper loops that are lengths greater than 12,000 feet. The quality of the CLECs' advanced services will suffer in comparison to the advanced services provided by Ameritech or its affiliate.

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[18] *Investigation into Ameritech Wisconsin's Unbundled Network Elements*, Docket 6720-TI-161. The Commission's oral drafting instructions are at this time being incorporated into its written order which is expected to be issued shortly.

Finally, given its vast investment in Project Pronto, Ameritech will have an incentive to retire its outmoded copper loop plant. To assuage the FCC, SBC made commitments to not retire copper in the next year, and restrictions for retiring it in the next three years. But Ameritech has no restrictions from retiring copper loop plant after 2003.[19]

By limiting access to its bottleneck facilities, the ILECs restrain their intramodal competitors while having little effect on intermodal competition. It is the restraint of intramodal competitors that slows DSL deployment and limits DSL's ability to discipline any price increase by intermodal, specifically cable broadband providers.[20] In fact, it has been the cable broadband that has disciplined price increases of DSL.

II. **Appropriate Regulatory Requirements**

A. Failures of Network Upgrades

Competitors believe that amidst the consolidation of the Regional Bell Operating Companies (RBOCs) during the last decade, one theme is consistent: promises of investments in advanced high-speed networks in exchange for regulatory forbearance have gone unfulfilled. Since the passage of the Telecommunications Act of 1996, incumbent local exchange carriers (ILECs) have been more successful in merging with each other than with opening their markets to local competition. As a result, the local exchange market remains a virtual monopoly for all but the largest telecommunications consumers.

The widespread availability of Integrated Service Digital Networks ("ISDN"), once promised, has never been delivered. Although ISDN has not materialized as promised, the

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[19] Project Pronto Waiver Order at par. 39.

[20] Jerry A Hausman, J. Gregory Sidak and Hal J Singer, *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, 2001 YALE LAW ON REGULATION 150, at p. 129.

RBOCs continue to sell ISDN today. Ameritech, for example, claims that ISDN speeds information:

> ISDN (Integrated Services Digital Network) is a technology capable of transmitting data at speeds up to 128K — significantly faster than you'll get with standard 28.8, 33.6, or 56K analog modems. In addition to speed, an ISDN connection lets you operate a number of telecommunications devices simultaneously using a single line. That's something you can't do with regular phone lines, and one reason why ISDN is ideal for telecommuting. Now you can download web pages up to four times faster. Or increase home office productivity by using your phone, fax, and computer at the same time. Best of all, you can do it all for just a fraction more than the cost of a second line.[21]

ISDN was the first example of the RBOCs' unfulfilled promises. Because ISDN is a switched service, increased use of ISDN meant increased investments in switching and inter-office transmission facilities. Thus, the RBOCs made little effort to market ISDN.

Today, many observers believe that it is Digital Subscriber Line (DSL) technology that has been slowed while RBOCs exhaust legal challenges and demand forbearance from regulation.[22] In 1998, the RBOCs, along with some computer companies, wrote a letter to the FCC stating that there was a problem in the local loop in providing high speed Internet access:

> ... the capabilities of the nation's telecommunications networks -- particularly our local networks -- are not keeping pace with user needs for faster, more reliable access to the Internet. Unless steps are taken to rectify this problem, growth of the Internet, and the wealth of new service applications that the Internet promises to create will be needlessly foreclosed."[23]

The letter included an attachment listing *Ten Principles for the Promotion of Widespread Deployment of Advanced Services* and called on the FCC to lessen regulation. In particular, the

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[21] SBC/Ameritech Residential Product and Services, Improving Internet Access: ISDN, available at http://www1.ameritech.com/sb/site/page/1,3002,2641,00.html?.

[22] Marius Schwartz, *The Economic Logic for Conditioning Bell Entry into Long Distance on the Prior Opening of Local Markets*, AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES, Working Paper 00-4 § 7.3.1(April 2000).

[23] The letter was joined by Compaq, Gateway, Intel, Microsoft, BellSouth, Bell Atlantic, GTE, SBC, and U.S. West. Ameritech did not join in the letter.

letter provided that "The FCC shall grant liberal waivers of requests for changes in interLATA boundaries for data services ...."

Competitors feel that the RBOCs attempt to circumvent the requirements in Section 271 of the Telecommunications Act of 1996 that mandate that Bell companies demonstrably open their local markets to competition prior to receiving relief from restrictions against providing InterLATA (local access and transport area) service.[24] These requirements are valuable tools to help achieve local competition.

Current telecommunications law, however, does not prevent RBOCs from providing broadband services to customers, if such broadband services do not cross LATA boundaries. In fact, RBOCs have already deployed this very same broadband technology in their home markets where new competitors are offering competing services.

B. Unlocking the Bottleneck

Broadband access over the local telephone network is an ideal candidate for regulating narrowly defined bottleneck inputs[25] and this is precisely the regime that the FCC and a number of states have already adopted: unbundling of ILEC advanced services. That facilities-based competition has not materialized is only a matter of time. Steady progress is being made by policymakers willing to promote competition in the face of ILEC intransigence and litigiousness.

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[24] On September 14, 2001, this Commission opened a 271 proceeding for SBC/Ameritech in anticipation of a 271 application. Such application has yet to be submitted. *Petition of Wisconsin Bell, Inc., for a Section 271 Checklist Proceeding, Docket No.* 6720-TI-170.

[25] William P. Rogerson, The Regulation of Broadband Telecommunications, the Principle of Regulating Narrowly Defined Input Bottlenecks, and Incentives for Investment and Innovation, 2000 UNIV. CHICAGO LEGAL F 119 at 124.

In its oral deliberations on December 19, 2001, this Commission decided to require Ameritech Wisconsin to offer its Broadband Service Offering as an end-to-end UNE.[26]

III. **Conclusion**

Many State commissions have completed or are currently in the midst of resetting prices for unbundled network elements for the RBOCs serving in their states. Further, many are in the midst of conducting extensive testing of operations support systems (OSS), so they will be prepared to make an expedited decision on the RBOCs' 271 applications. This work and State responsibility for promoting local competition and the deployment of advanced services, as outlined in sections 254(h)(l)(B), (I), (k) (Universal Service), 271(d) (InterLata Relief and the 14 point checklist), and 706(a) (Broadband Deployment), is valuable and should be continued. States are seeing the infancy of local telecommunication competition and the deployment of advanced services by both RBOCs and CLECs.

Any regulations that the FCC adopts in this area must not have the effect of preempting extensive work already done in a number of states, following the FCC's guidelines, seeking to promote competition. By staying the course with the '96 Act, and its' incentive based regulation, states and the FCC can foster local competition and promote the timely deployment of advanced services.

Dated at Madison, Wisconsin, March 1, 2002.

By the Commission:

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[26] Docket 6720-TI-161. The Commission's oral drafting instructions are at this time being incorporated into its written order which is expected to be issued shortly.

CC Docket 01-337

/s/ Lynda L. Dorr

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Lynda L. Dorr
Secretary to the Commission

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